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N VASANTHA RAJAN NAGARAJAN v. YEOH SOON PENG & ANOR

HIGH COURT MALAYA, PULAU PINANG
GEORGE VARUGHESE JC
[SUIT NO: PA-22NCVC-212-11-2016]
B 2 APRIL 2021

CIVIL PROCEDURE: *Admission – Judgment on admission, application for – Judicial admission of facts – Case remitted for retrial – Allegation that judicial admission unavailable in previous trial – Whether caused change in circumstances – Whether amounted to 'fresh evidence' – Whether way to circumvent or breach earlier decision – Whether case could be decided summarily – Rules of Court 2012, O. 27 r. 3*

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CIVIL PROCEDURE: *Affidavits – Jurat – Affidavit by person illiterate in Bahasa Melayu – Affidavits filed without requisite jurat – Evidence under oath given in Hokkien dialect – Whether affidavits read to and understood by deponent – Whether absence of jurat constituted breach of O. 41 r. 3 of Rules of Court 2012 – Whether irregularity substantial – Whether curable*

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LAND LAW: *Caveat – Removal of – Abandonment of grounds for entry of caveat – Whether evidence supported caveatable interest – Whether grant of administration confers any interest or title – Whether caveats ought to be removed*

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The deceased, N Arumugam Pillai, left a will in which all his properties, including his residual estate, were bequeathed to: (i) Nagarajan a/l N Arumugam Pillai (25%); (ii) Thangavelu a/l N Arumugam Pillai (40%); (iii) Mrs Thanganachiar (20%); and (iv) the plaintiff, the son of Nagarajan a/l N Arumugam Pillai, (15%). The deceased did not bequeath anything in the will to the second defendant, the illegitimate son of the deceased. However, the second defendant, having wrongly represented himself as the sole beneficiary of the estate of the deceased, applied and obtained a grant of administration of the estate of the deceased. Subsequently, the second defendant, represented by Messrs Tan Bak Lee & Co, who at all material times were aware that the deceased died testate and the plaintiff was the executor of the estate of the deceased, had wrongly caused the lands to be vested in the first defendant ('vesting order'). The grant of administration and the vesting order were obtained by the second defendant, an undischarged bankrupt, without the sanction of the Director General of Insolvency in breach of s. 38 of the Bankruptcy Act 1967. The plaintiff's application in encl. 194 herein, pursuant to O. 27 r. 3 of the Rules of Court 2012 ('ROC'), was to enter judgment on admission of facts, *ie*, for an order that the first defendant's private caveat entered on nine properties ('lands') be removed forthwith. The matter was previously tried and decided by the Penang High Court ('first trial'). At the completion of the first trial, the plaintiff's claim

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was dismissed on the ground that the plaintiff did not possess the necessary *locus standi* to commence the case against the defendants as the deceased did not execute the will, *ie*, the will was forged. Dissatisfied, the plaintiff appealed to the Court of Appeal. The appeal was allowed and the case was remitted back to the Penang High Court for a retrial before another High Court Judge ('CA decision'). The plaintiff raised a preliminary objection that the first defendant's affidavits to oppose the plaintiff's application were in breach of O. 41 r. 3 of the ROC and were, therefore, defective on the grounds that: (i) the first defendant was bound by his judicial admission that he could not comprehend Bahasa Melayu without interpretation; and (ii) the lack of the mandatory certification in the jurat by the Commissioner for Oaths that: (a) the affidavits were read in the presence of the deponent; (b) the deponent seemed to perfectly understand it; and (c) the deponent made his signature mark in his presence. The substantive grounds in support of the plaintiff's application, *inter alia*, were that (i) the first defendant's judicial admission in his testimony before the Penang High Court contradicted with the first defendant's averments in the nine Forms 19B and was a departure from it; (ii) no caveatable interest was shown as the first defendant had abandoned his ground for caveating the lands as stated in all the nine Forms 198; (iii) the first defendant's judicial admissions in court did not support the caveatable interest claimed in his nine Forms 198; and (iv) the first defendant could not rely on the second defendant's letters of administration that had been revoked in Suit 46.

Held (granting order in terms for prayers 1 and 2 of encl. 194):

(1) In light of the judicial admissions arising from the first trial, the plaintiff was entitled to rely on the same to mount an application pursuant to O. 27 r. 3 of the ROC. The judicial admissions relied upon in the plaintiff's application was, for obvious reasons, not available during the first trial. The emergence of the judicial admissions meant that there was a change in circumstances since the first trial. The 'fresh evidence' allowed for the re-trial to be conducted in a manner other than by way of taking *viva voce* evidence. Therefore, the CA decision did not fetter the discretion nor prohibit this court, if appropriate, to determine this case summarily in whole or in part. Thus, the plaintiff's application did not, in any way, circumvent nor was in breach of the CA decision to have this matter remitted for a retrial. (paras 24-26)

(2) All the affidavits filed by the first defendant were in Bahasa Melayu and were affirmed without the requisite certification jurat stipulated in O. 41 r. 3 of the ROC even though the first defendant was illiterate in Bahasa Melayu. The notes of evidence of the first trial showed that the first defendant gave his evidence under oath in the Hokkien dialect. The first defendant also testified that he did not understand Bahasa Melayu, although he could read Bahasa Melayu, and that he required

A interpretation or explanation to understand anything written in Bahasa Melayu. In light of the unequivocal judicial admission by the first defendant and since the affidavits were not in simple or basic layman's Bahasa Melayu, there was merit in the plaintiff's preliminary objection that the first defendant's affidavits were defective. (paras 29, 30 & 32)

B **(3)** In the absence of the certification jurat which was essential to the question on truthfulness of the contents of the first defendant affidavits, the court was not satisfied that his affidavits were read to and understood by the first defendant. The breach of O. 41 r. 3 constitutes a substantial irregularity and was not curable under O. 41 r. 4 or O 1A or O. 2 r. 3 C of the ROC. Thus, the first defendant's affidavits could not be accepted and should not be used in evidence in determining the plaintiff's application. (paras 35 & 36)

(4) Order 27 r. 3 of the ROC allows a party in receipt of a clear and explicit admission of fact from an opponent, to apply to the court for a 'speedy D judgment' upon the admission, by way of a summary procedure, without having to wait for the determination of any outstanding issues between the parties. In all the nine Forms 198, the first defendant's reason in his application for entry of caveat was that he had granted a personal loan of RM3,590,000 and provided services to the second defendant in E identifying the lands belonging to the estate of the deceased, and in consideration of the same, the second defendant, agreed to best the lands in his name. However, in his testimony in the first trial, the first defendant changed his reasons and abandoned all the grounds stated in all his nine Forms 198. Therefore, the first defendant's nine caveats F could not remain. (paras 41, 44, 45 & 51)

(5) As the evidence did not support the claim to a caveatable interest or that there was a serious issue to be tried, the court must order for the removal of the caveats without even having to go to the third stage. Further, the first defendant, as a caveator, could not rely on the second defendant's G grant of administration which had been revoked in Suit 46, the action by the plaintiff against the first and second defendants to recover the land which formed part of the deceased's estate. As such, the grant of administration could not confer any interest or title on the second defendant. Since the second defendant had no title to pass to the first H defendant, the principle of *nemo dat quad non habet* applied. (paras 55 & 56)

(6) In addition, the first defendant could not have been the *bona fide* purchaser of the lands for value because he was an undischarged bankrupt. He was adjudged bankrupt for a debt of RM56,900 since 2010 I and could not have subsequently bought the lands for RM3.59 million. The other reason advanced by the first defendant for caveating the lands,

ie, for providing services to the second defendant in identifying land belonging to the estate of the deceased, did not, in law, amount to a caveatable interest. Furthermore, the judicial admissions of the first defendant showed that it was the second defendant who found/located the lands and not the first defendant. The first defendant merely carried out land searches at the land office. (paras 59 & 60)

(7) The balance of justice would be better served for the caveats to be removed as there was no reason to maintain the *status quo* until the trial of this matter because there was no pending action by the defendants. The grant of probate remained valid and had not been revoked. So long as the grant of probate existed, the same must be obeyed. The second defendant was represented by Messrs Tan Bak Lee & Co in the application for the vesting order who, at all material times, were aware that the deceased died testate and that the plaintiff was the executor of the estate of the deceased. It is trite law that the knowledge of a solicitor is imputed upon his client. (paras 62-64)

Case(s) referred to:

Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors [1988] 1 LNS 88 HC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] 1 LNS 30 FC ***(foll)***

Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA ***(refd)***

Hu Chang Pee v. Tan Sri Datuk Paduka (Dr) Ting Pek Khiing [1999] 7 CLJ 328 HC ***(refd)***

Lee Ngan Fong & Ors v. Gan Bo Tan & Ors [2011] 1 LNS 770 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(foll)***

Maria Yusof v. Abdullah Gendak [2015] 9 CLJ 243 HC ***(refd)***

N Vasantha Rajan Nagarajan v. Yeoh Soon Peng & Anor [2017] 1 LNS 939 HC ***(refd)***

S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 HC ***(refd)***

Teck Hong Development Sdn Bhd v. Toh Chin Ann [2008] 4 CLJ 756 CA ***(refd)***

TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC ***(foll)***

Vithal Kumar Jayaraman v. Azman Md Nor [2010] 3 CLJ 332 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)

National Land Code, s. 340(2)(b), (4)(b)

Probate and Administration Act 1959, s. 60(4)

Rules of Court 2012, O. 1A, O. 2 r. 3, O. 27 r. 3(2), O. 33 rr. 2, 3, O. 34 r. 1, O. 41 rr. 3, 4, O. 92 r. 4

Rules of the High Court 1980, O. 27 r. 3

For the plaintiff - Tan Kah Hoo & Loh Li Lian; M/s Gan Teik Chee & Ho
For the 1st defendant - Ang Khoon Cheong; M/s CP Ang & Co

Reported by S Barathi

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JUDGMENT

George Varughese JC:

Introduction

B **[1]** Enclosure 194 is an application by the plaintiff *via* notice of application dated 8 May 2019 ("plaintiff's application"), pursuant to O. 27 r. 3 of the Rules of Court 2012 ("ROC 2012") to enter judgment on admission of facts ie, for an order that the first defendant's private caveats entered on nine properties ("lands") are removed forthwith.

C **Brief History**

[2] This matter was previously tried and decided by the Penang High Court on 19 October 2018 ("first trial").

[3] At the completion of the first trial, the plaintiff's claim against both defendants was dismissed on the ground that the plaintiff did not possess the D necessary *locus standi* to commence this case against the defendants, as N Arumugam Pillai alias N.T.S. Arumugam Pillai son of Nagappa Pillai, deceased ("deceased"), did not execute the will dated 20 March 2017 ("will"), ie, the will was forged.

E **[4]** The plaintiff being dissatisfied with the decision, appealed to the Court of Appeal. On 23 April 2019, the Court of Appeal allowed the plaintiff's appeal and remitted the case back to the Penang High Court for a retrial before another High Court Judge ("Court of Appeal decision").

Background Facts

F **[5]** On 30 May 2017, in the Penang High Court Civil Suit No: PA-22NCvC-46-03/2016, Lim Chong Fong J, allowed the plaintiff's claim against the first and second defendants and dismissed the first defendant's counterclaim ("Suit 46").

G **[6]** The appeals lodged by both defendants in respect of the decision in Suit 46 were not successful.

[7] The material facts as distilled from the grounds of judgment of Lim Chong Fong J, in Suit 46 as reported in *N Vasantha Rajan Nagarajan v. Yeoh Soon Peng & Anor* [2017] 1 LNS 939; [2017] MLJU 890, are as follows:

H (i) the second defendant is the illegitimate son of the deceased. The second defendant became the administrator of the estate of the deceased by virtue of grant of administration dated 12 March 2015 issued *via* Penang High Court Originating Summons No: 31NCvC-185-06/2014 ("grant of administration");

I (ii) the first defendant was declared bankrupt by the Penang High Court on 2 March 2010. Similarly, the second defendant was declared bankrupt twice by the Penang High Court on 29 July 1999 and 25 August 2004;

(iii) the sanction of the DGI is mandatory by virtue of s. 38(1) of the Bankruptcy Act 1967 and that included defending the action, pursuing the counterclaim and appointing solicitor and counsel;

(iv) the plaintiff is the remaining executor as well as son of N.A.R. Nagarajan @ Nagarajan a/I N Arumugam Pillai @ N.T.S. Arumugam Pillai son of Nagappan Pillai;

(v) In the will, the deceased bequeathed all his properties including his residual estate to the following beneficiaries:

(a) N.A.R. Nagarajan @ Nagarajan a/I N. Arumugam Pillai @ N.T.S. Arumugam Pillai son of Nagappan Pillai - 25%;

(b) Thangavelu a/I N. Arumugam Pillai @ N.T.S. Arumugam Pillai son of Naggapan Pillai - 40%;

(c) Mrs Thanganachiar - 20%; and

(d) The plaintiff - 15%.

(vi) In the will it is stated, Mrs AR Seethai, the deceased's wife whom he married in India died on 16 September 1985. It is also stated therein that the deceased married Mrs Ranjit Devi during his stay in Penang when his marriage to Mrs AR Seethai was still subsisting. The second defendant is the son born by Mrs Ranjit Devi. And it is specifically spelled out that the deceased is not bequeathing anything to the son and daughter born by Mrs Ranjit Devi as the deceased had provided sufficient properties for them;

(vii) the marriage of the deceased and Mrs Ranjit Devi is invalid under the Hindu Marriage Act 1955. Consequently the second defendant is the illegitimate son of the deceased. It follows that the second defendant cannot in law be a beneficiary to the estate of the deceased, even if the deceased died intestate;

(viii) the second defendant wrongly represented himself as the sole beneficiary of the estate of the deceased and applied to the Kuala Lumpur High Court and obtained the grant of administration. He further falsely represented that the death of the deceased as 16 November 2004 instead of 27 April 1989. As a result, the second defendant misled the Kuala Lumpur High Court (Bahagian Kuasa Mati) into issuing a white Borang C for administration of estate purposes. After having obtained the grant of administration, the second defendant without informing the Kuala Lumpur High Court (Bahagian Kuasa Mati) amended the date of death of the deceased. This was highly irregular on the part of the second defendant because that would have resulted in the cancellation of the Borang C that was earlier issued;

(ix) Subsequently, in June-July 2015, the second defendant wrongly caused the lands to be vested in the first defendant pursuant to an amended court order dated 16 June 2015 obtained *via* Penang High Court *Ex parte* Originating Summons No: 24NCvC-444-05/2015 ("vesting order"). The second defendant was represented by Messrs. Tan Bak Lee & Co in the application for the vesting order, who at all material times were aware that the deceased died testate and that the plaintiff is the executor of the estate of the deceased;

(x) the second defendant applied and obtained the grant of administration and the vesting order without the sanction of the Director General of Insolvency ("DGI") in breach of s. 38 of the Bankruptcy Act 1967;

(xi) thus, the second defendant being an undischarged bankrupt did not have the legal capacity to apply for and obtain the grant of administration and the vesting order;

(xii) the second defendant must fully disclose his incapacity to the High Court, which he had failed to do;

(xiii) the second defendant wrongly and deliberately concealed material facts and made false representations to the High Court when he applied and obtained both the grant of administration and the vesting order. Accordingly, both the grant of administration and the vesting order are susceptible to impeachment. The grant of probate dated 26 June 1990 under Petition No: 32-51-90 ("grant of probate") subsisted at all material times and has never been revoked. The grant of probate cannot collaterally be overridden or superseded by the grant of administration;

(xiv) the second defendant never had the right to sell and pass good title in the lands to the first defendant and the principle of *nemo dat quod non habet* applied. The vesting order was also irregularly used to register the land in the name of the first defendant. The vesting order was tactically used by the second defendant in abuse to circumvent the private caveat lodged by the plaintiff to restrain any dealing in the lands;

(xv) the second defendant contravened s. 60(4) of the Probate and Administration Act 1959 by effectively having transferred the lands to the first defendant without the consent of all the beneficiaries and permission of the High Court;

(xvi) the grant of administration and the vesting order affected the rights and interests of persons not made parties to the proceedings inclusive of the plaintiff. Hence, the orders are nullities;

(xvii) an overwhelming case of fraud was committed by the second defendant upon the plaintiff, if not also upon the court. Consequently, the grant of administration and the vesting order must be set aside;

(xviii) therefore, the first defendant is a constructive trustee of the lands by virtue of his dealing with the second defendant;

(xix) the first defendant could not have been the *bona fide* purchaser of the lands for value because he is an undischarged bankrupt. He was adjudged bankrupt for a debt of RM56,900 since 2010 and could not have subsequently bought the lands for RM3.59 million as alleged by both the defendants;

(xx) notwithstanding that the first defendant is the registered owner of the land, the first defendant's title is defeasible pursuant to ss. 340(2)(b) and/or 340(4)(b) of the National Land Code. The first defendant is the constructive trustee of the estate of the deceased;

(xxi) As the result, the counterclaim made by the first defendant against the plaintiff for removal of the plaintiff's private caveat that was wrongly lodged on the lands and consequential damage suffered as a result thereof is unsustainable. In any event, the first defendant cannot maintain his counterclaim without the prior sanction of the DGI;

The Plaintiff's Contentions

[8] The plaintiff raised a preliminary objection that the first defendant's affidavits to oppose the plaintiff's application were in breach of O. 41 r. 3 ROC 2012, therefore are defective, on the following grounds:

(i) first defendant is bound by his judicial admission that he cannot comprehend Bahasa Malaysia without interpretation; and

(ii) the lack of the mandatory certification in the jurat by the commissioner for oaths that:

(a) the affidavits were read in the presence of the deponent;

(b) the deponent seemed to perfectly understand it; and

(c) the deponent made his signature or mark in his presence.

[9] The substantive grounds in support of the plaintiff's application, are as follows:

(i) first defendant's judicial admission in his testimony before the Penang High Court on 13 March 2018 and 4 April 2018 contradicted with the first defendant's averments in the nine Form 19B and is a departure from it, as follows:

(a) first defendant did not know the price of the lands he purchased, did not know the land area of the lands, did not inspect the lands and that no specific price was stated;

(b) first defendant did not purchase the said lands but caveated it to help the second defendant;

A (c) there was no consideration for the purported purchase of the lands since according to the first defendant, RM3.59 million had been used as consideration to purchase Lot 645, it cannot be reused for the purchase of the lands; and

(d) first defendant caveated the lands because the second defendant wanted to compensate him.

(ii) no caveatable interest was shown as the first defendant abandoned his ground for caveating the lands as stated in all the nine Form 19B;

(iii) first defendant's judicial admissions in court do not support the caveatable interest claimed in his nine Form 19B;

(iv) first defendant cannot rely on the second defendant's letters of administration that have been revoked in Suit 46;

(v) the findings of the court that the second defendant is not a beneficiary of the deceased;

(vi) no proof of actual payment of RM3.59 million by the first defendant;

(vii) knowledge of a solicitor is imputed to his client;

(viii) the grant of probate remains intact and unrevoked;

(ix) first defendant is not a *bona fide* purchaser of the lands for valuable consideration without notice; and

(x) first defendant has no *locus standi* to challenge the validity of the will of the deceased since he is not a beneficiary of the will.

The First Defendant's Contentions

[10] In opposing the plaintiff's application, the first defendant raised the following preliminary issues:

(i) the effect of the Court of Appeal decision is that there must be a trial of this matter before another High Court Judge and not for this matter to be disposed of by another High Court Judge by way of an application under O. 27 r. 3 of the ROC 2012, and

(ii) the plaintiff's attempt to obtain the reliefs prayed for in the statement of claim by way of an application under O. 27 r. 3 of the ROC 2012 is in breach of the Court of Appeal decision;

[11] The first defendant also raised the following substantive issues:

(i) since the capacity of the plaintiff to institute this suit as the executor of the estate of the deceased is being challenged by the first defendant, this suit is unsuitable to be determined pursuant to O. 27 r. 3 of the ROC 2012, purportedly on admission of facts;

(ii) there is no admission by the first defendant as contended by the plaintiff; A

(iii) there is no evidence of the first defendant's admission that he has no caveatable interest in the lands;

(iv) first defendant was not purchasing the lands from the second defendant and the second defendant agreed that the lands be transferred/vested by B the second defendant to first defendant to repay the loan and for services rendered; and

(v) admissions must be clear and precise on a particular fact for an order to be made under O. 27 r. 3 of the ROC 2012 and cannot be based on contradictions, conjectures or inferences by the actions or words used by C the first defendant.

The Second Defendant's Position

[12] The second defendant did not file any affidavit to oppose encl. 194.

[13] Although the second defendant attended court, as he is an D undischarged bankrupt, was not represented and did not participate in the proceedings.

The Law

[14] Judicial admission is an agreement or concession made by parties in E a judicial proceeding (or by their counsels) relating to the business before the court and must be in writing unless they are part of the court record.

[15] Order 27 r. 3 of the ROC 2012 provides as follows:

> Judgment on admission of facts (O. 27 r. 3) F
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> 3. (1) Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. G
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> (2) An application for a judgment or order under this rule shall be made by a notice of application.

[16] In the case of *Hu Chang Pee v. Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 7 CLJ 328; [1999] 3 MLJ 402, Hasan JC, stated: H

> The learned authors in *The Law of Evidence* by Ratanlal and Dhirajlal (17 Edn, 1987) made the following comments relating to s. 17 of the Evidence Act at p. 53:
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> > Admissions may be oral or contained in documents, eg letter, depositions, affidavits, plaints, written statements, deeds, receipts, I horoscopes. Admissions in pleadings are judicial admissions. They can be made the foundation of rights.

A And at p. 54 the following comment was made:

> The general rule is that admissions are admissible against the party making them and not against any other party.

In respect of s. 18 of the Evidence Act the following comment was made at p. 55:

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> **A statement made by a party in a former suit between the same or different parties is admissible**.

In *Phipson On Evidence* (14th Ed) it is stated at p. 624 that:

> **When a party sues, or is sued, personally, any admission made**
C **by him on a former occasion, even while a minor, or sustaining a representative character, may be given in evidence against him**; but when sued or suing as a representative, his principal cannot be prejudiced by his admissions made before sustaining, or after he has ceased to sustain that character.
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> (emphasis added)

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Findings

First Defendant's Preliminary Issues

[17] I will first deal with the first defendant's preliminary points as to
E whether encl. 194 goes against the Court of Appeal decision.

[18] The Court of Appeal decision, *inter alia*, reads as follows:

> DIPERINTAHKAN bahawa:
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> (a) ...
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F (b) ...
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> (c) Kes dikembalikan ke Mahkamah Tinggi Pulau Pinang untuk dibicarakan oleh Hakim yang lain dan kes ditetapkan untuk pengurusan kes pad a 7-5-2019.

G **[19]** Having carefully considered the Court of Appeal decision, I hold that the Court of Appeal decision merely directs that the case be remitted back to the Penang High Court to be tried before a different judge. The said Court of Appeal decision does not require nor stipulate the manner or mode in which the case ought to be tried.

H **[20]** The court is empowered by the ROC 2012 to determine the manner and mode in which a trial is to be conducted. For example, O. 33 r. 2 of ROC 2012, provides as follows:

> Time of trial of questions or issues (O. 33 r. 2)
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> 2. The Court may order any question or issue arising in a cause or matter,
I whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[21] And, in O. 33 r. 3 of ROC 2012, it is stipulated:

Determining mode of trial (O. 33 r. 3)

(1) In every action begun by writ, an order made at the pretrial case management shall determine the mode of trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.

(2) In any such action, different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

[22] Additionally, the discretion and the inherent powers of the court are spelt out in O. 34 r. 1 and O. 92 r. 4, and O. 1A of the ROC 2012, as follows:

Orders and directions for just, expeditious and economical disposal of proceedings (O. 34 r. 1)

1. (1) Notwithstanding anything in these Rules, the Court may, at any time after the commencement of proceedings, of its own motion, direct any party or parties to the proceedings to appear before the Court, in order that the Court may make such order or give such direction as it thinks fit so that:

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with; and

(b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.

Inherent powers of the Court (O. 92, r. 4)

4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Regard shall be to justice (O. 1A)

In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[23] As such, since this court is permitted by the ROC 2012 to determine the mode of trial for the just, expeditious and economical disposal of proceedings, I am unable to agree with the proposition by Mr Ang Khoon Cheong, learned counsel for the first defendant that there ought to be trial of this matter by calling of each parties' witnesses.

[24] Further, in light of the judicial admissions arising from the first trial, the plaintiff is entitled to rely on the same to mount an application pursuant to O. 27 r. 3 of the ROC 2012. The judicial admissions relied upon in the plaintiff's application was for obvious reasons, not available during the first trial.

[25] The emergence of the judicial admissions means that there is a change in circumstances since the first trial. This 'fresh evidence' allows for the re-trial to be conducted in manner other than by way of taking *viva voce* evidence.

[26] Therefore, I hold that the Court of Appeal decision, does not fetter the discretion nor prohibit this court, if appropriate, to determine this case summarily in whole or in part. Thus, the plaintiff's application does not in anyway circumvent nor is in breach of the Court of Appeal decision to have this matter remitted for a retrial.

Plaintiff's Preliminary Issue

[27] I will now deal with the preliminary issue raised by the plaintiff that the first defendant's affidavits are defective as they are in breach of O. 41 r. 3, of the ROC 2012.

[28] Order 41 r. 3 of the ROC 2012 provides as follows:

> Affidavit by illiterate or blind person (O. 41, r. 3)
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> 3. Where it appears to the person administering the oath that the deponent is illiterate or blind, he shall certify in the jurat that:
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> (a) the affidavit was read in his presence to the deponent;
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> (b) the deponent seemed perfectly to understand it; and
>
> (c) the deponent made his signature or mark in his presence,
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> and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

[29] All the affidavits filed by the first defendant are in Bahasa Melayu and were affirmed before Encik Hj Jafri bin Arasad without the requisite certification jurat stipulated in O. 41 r. 3 of the ROC 2012 even though the first defendant is illiterate as to Bahasa Melayu.

[30] The notes of evidence of the first trial show that the first defendant gave his evidence under oath in the Hokkien dialect. The first defendant also testified that he does not understand Bahasa Melayu, although he can read Bahasa Melayu, and that he requires interpretation or explanation to understand anything written in Bahasa Melayu.

[31] The first defendant did not adduce any contrary evidence to prove otherwise except for para. 5 of the afidavit jawapan II affirmed by the first defendant on 17 June 2019, where it is deposed that he can read and speak in Bahasa Melayu. It is also averred therein that he can understand Bahasa Melayu but not words which have deeper meanings. As such, the first defendant contended that he does not require a jurat with a translation incorporated therein to affirm his affidavits.

[32] In light of the unequivocal judicial admission by the first defendant and since the affidavits were not in simple or basic layman's Bahasa Melayu, I find that there is merit in Mr Tan Kah Hoo, learned counsel for the plaintiff's preliminary objection, ie, the first defendant's affidavits are defective.

[33] In *S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152, Low Hop Bing J (as His Lordship then was), held:

> Upon a proper construction of O. 41, r. 3, I have no hesitation in holding that the requirements of O. 41, r. 3 are clearly and obviously mandatory in nature. In order to use an affidavit under O. 41, r. 3, it is absolutely essential that the conditions prescribed therein have been meticulously complied with, as the person administering the oath (in Malaysia, usually a commissioner for oaths, a Magistrate or a Sessions Court Judge) must certify that the aforesaid three conditions have been complied with, failing which the affidavit **shall not be used in evidence**.
>
> The pre-requisite for such a mandatory requirement of O. 41, r. 3 is "where it appears to the person administering the oath that the deponent is illiterate or blind". In the rules, the word "illiterate" is not defined or explained. It is therefore necessary to refer to the natural, ordinary and popular meaning of this word as found in the dictionary. I have referred to the *Shorter Oxford English Dictionary* where the word "illiterate" means one who is unable to read. In the context of the affidavit in Bahasa Malaysia as affirmed by the deponent, it must mean that the deponent is unable to read Bahasa Malaysia. In the circumstances, *prima facie* the affidavit of the deponent shall not be used in evidence unless there is evidence to the effect that the deponent is literate in Bahasa Malaysia or unless a certificate in accordance with O. 41, r. 3 has been affixed on the affidavit itself.
>
> In order to use it as evidence, the Court has to be satisfied that the affidavit was read to and explained to and appeared **to be perfectly understood by the deponent**. There is nothing in the affidavit to indicate that the affidavit appeared to be perfectly understood by the deponent.
>
> In the circumstances, I find that the deponent's affidavit is defective and under O. 41, r. 3, it shall not be used in evidence.
>
> (emphasis added)

[34] Further, in *Maria Yusof v. Abdullah Gendak* [2015] 9 CLJ 243, Mohd Nazlan Ghazali JC (as His Lordship then was), stated:

> I emphasise that *the omission in respect of the certification in the jurat is substantive and sufficiently material because rules concerning certification jurat cannot be considered as mere technicalities or formalities. They are integral to the very question on the authenticity of the contents of the affidavits which are to be used as evidence in the court of law*. Accordingly, as the three affidavits are defective, the plaintiff cannot place any reliance on the same.
>
> (emphasis added)

[35] Therefore, in the absence of the certification jurat which is essential to the question on truthfulness of the contents of the first defendant's affidavits, I am not satisfied that his affidavits were read to and it appeared to be perfectly understood by the first defendant.

[36] The breach of O. 41 r. 3 of the ROC 2012 constitutes a substantial irregularity and is not curable under O. 41 r. 4, or O. 1A or O. 2 r. 3 of the ROC 2012. Thus, the first defendant's affidavits cannot be accepted and shall not be used in evidence in determining the plaintiff's application.

Substantive Issues

[37] In any event, despite the lack of evidence from the first defendant, the plaintiff still bears the burden to prove his case pursuant to O. 27 r. 3(2) of the ROC 2012.

[38] Having judiciously considered the plaintiff's application, the plaintiff's affidavits and the submissions of the plaintiff and the first defendant, both written and oral, together with the authorities cited, I find that there are merits in the plaintiff's application, for the reasons stated hereinafter.

Judicial Admissions

[39] The notes of evidence of the first trial show that, the first defendant whilst testifying in the court made judicial admissions, summarised, as follows:

(i) although he purchased the lands, he did not know the purchase price, did not know the land area of the lands and did not inspect nor visited the lands;

(ii) that he did not purchase the lands and the reason he caveated the lands was to help the second defendant;

(iii) admitted that since RM3.59 million had been used as the consideration for the purchase of Lot 645, it cannot be reused again to purchase the lands;

(iv) he agreed that RM3.59 million was the purchase price only for Lot 645;

(v) he caveated the lands because the second defendant wanted to compensate him; and

(vi) admitted that he did not purchase the lands and that the lands were compensation from the second defendant to him.

[40] The above judicial admissions by the first defendant contradicted his averments in the nine Form 19B and are a departure from it. It also means that there was no consideration for the purported purchases.

[41] Order 27 r. 3 of the ROC 2012 allows a party in receipt of a clear and explicit admission of fact from an opponent, to apply to court for a "speedy judgment" upon the said admission, by way of a summary procedure, without having to wait for the determination of any other outstanding issues between the parties.

[42] In *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332; [2010] 2 MLJ 67, delivering the judgment of the Court of Appeal, Ramly Ali JCA (as His Lordship then was), explained the object of O. 27 r. 3 of the Rules of the High Court 1980, as follows:

> [13] *The object of the above rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed in his claim* (see *Ellis v. Allen* [1914] 1 Ch 904 at p 909 and *Low Yoke Lan v. Ng Ooi Kiat* [2001] 4 AMR 4781).
>
> [14] This rule relates to admissions of fact, whether in the pleadings or otherwise. *The admission must be a clear admission, and not simple evidence of some facts upon which the plaintiff would have to rely to establish his cause of action* (see *Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors* [1988] 3 MLJ 271 at p 272).
>
> [15] *The words 'or otherwise' in the said rule are of general application and justify the making of an order or judgment where an admission is made by letter or other relevant documents or agreements which clearly show that the defendant has no defence to the plaintiff's claim. They are not confined to admissions contained in the pleadings alone* (see *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 MLJ 347 (SC)).
>
> (emphasis added)

[43] The plaintiff's claim is ultimately for an order that all the nine private caveats lodged by the first defendant over the lands be removed forthwith. Hence, the only issue before the court is whether the first defendant has a caveatable interest and whether the nine caveats should be allowed to remain.

[44] In all the nine Form 19B, first defendant's reason in his application for entry of caveat is that he had granted a personal loan of RM3,590,000 and provided services to the second defendant in identifying land belong to the estate of the deceased, and in consideration of the same, the second defendant as the administrator and beneficiary to the deceased agreed to vest the lands in his name.

[45] However, in his testimony in the first trial as explained earlier, the first defendant changed his reasons. In fact, the first defendant abandoned all the grounds stated in all his nine Form 19B.

[46] As the basis of the first defendant lodging caveats on the lands rested on a personal loan and providing services to the second defendant in identifying land belonging to the estate of the deceased, the burden was on

A the first defendant to satisfy the court of these reasons. However, the first defendant clearly failed to discharge the burden, as he changed his reasons in his evidence before the court.

Caveatable Interest

B **[47]** In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, Gopal Sri Ram JCA (as His Lordship then was) succinctly explained the three-stage test to be applied in an application to remove a caveat, as follows:

> In my judgment, there are three stages through which an inquiry of this
> C nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.
>
> D …
>
> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that
> E has to be offered will, of course, vary from case to case.
>
> …
>
> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the
> F balance of convenience'. As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.
>
> *It is only upon satisfying these three stages of curiaI scrutiny that a caveat may be*
> G *permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary*.
>
> (emphasis added)

H **[48]** Applying the test laid down in *Luggage Distributors* (*supra)*, I find that the first defendant having abandoned his ground for caveating as stated in all the nine Form 19B, failed to establish that he has any caveatable interest in the lands.

I

[49] In *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77; [1996] 3 MLJ 437, delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA (as His Lordship then was), pronounced that:

> Taking the former contention – the stance that the document in question was an agreement – was clearly not the basis upon which he had entered the caveat. *Here is a case of a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.*
>
> (emphasis added)

[50] As a result, there is no justification in law for the first defendant to maintain all his caveats on a ground different from that was averred in his nine Form 19B. The effect of abandoning his grounds as stated in the nine Form 19B is that, there is no longer any ground to sustain his caveats. Accordingly, if the grounds disclosed in the nine Form 19B do not disclose a caveatable interest, then it is *cadit quaestio* – see *Teck Hong Development Sdn Bhd v. Toh Chin Ann* [2008] 4 CLJ 756.

[51] Therefore, on this ground alone, the first defendant's nine caveats cannot remain. Nevertheless, for completeness, I will also deal with the second and third stages as alluded to in *Luggage Distributors* (*supra*).

[52] The first defendant's evidence in the judicial admissions mentioned earlier, do not support the caveatable interest claimed in his nine Form 19B or shows that the first defendant's claim to a caveatable interest raises a serious issue to be tried.

[53] The affidavit evidence of the first defendant is the same as the grounds stated in the nine Form 19B. Therefore, since the grounds averred in the nine Form 19B had been abandoned, there is no evidence to support the caveatable interest claimed in the nine Borang 19B or show that the claim to a caveatable interest raises a serious issue to be tried.

[54] Hence, I am unable to agree with the submission of learned counsel for the defendant that the judicial admission of the first defendant must be that he has no caveatable interest in the properties in question. The judicial admission of the first defendant need not explicitly admit that he has no caveatable interest. It is sufficient if the contents of the judicial admission of the first defendant clearly show that he has no caveatable interest, which is the case in this instance.

[55] Consequently, as the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried, the court must order for the removal of the caveats without even having to go to the third stage.

[56] Further, the first defendant, as a caveator cannot rely on the second defendant's grant of administration which had since been revoked. As such, the grant of administration cannot confer any interest of title on the second defendant. Thus, since the second defendant had no title to pass to the first defendant, the principle of *nemo dat quod non habet* applied.

[57] Further, in para. 7 of his defence, the first defendant relies on the grant of administration to support his contention of having a caveatable interest. Since the grant of administration has been revoked, I agree with learned counsel for the plaintiff that, as a result the substratum of the first defendant's defence falls.

[58] Furthermore, in light of the judicial admission of the first defendant that RM3.59 million had been used as consideration for the purchase of Lot 645 and not for the lands, it obviously cannot be used again for the purchase of the lands. Following which, both on fact and law, the first defendant does not have a caveatable interest on the lands.

[59] In addition, Lim Chong Fong J also made a finding in Suit 46 that the first defendant could not have been the *bona fide* purchaser of the lands for value because he is an undischarged bankrupt. He was adjudged bankrupt for a debt of RM56,900 since 2010 and could not have subsequently bought the lands for RM3.59 million as alleged by both the defendants.

[60] I also find the other reason advanced by the first defendant for caveating the lands, ie, providing services to the second defendant in identifying land belonging to the estate of the deceased, does not in law amount to a caveatable interest. And, the judicial admissions of the first defendant show that it was the second defendant who found/located the lands and not the first defendant. The first defendant merely carried out land searches at the land office.

Balance Of Justice

[61] The first defendant's claim to maintain the caveat relied on the grant of administration and the vesting order. However, both the grant of administration and the vesting order have been revoked in Suit 46. And since the first defendant's counterclaim in Suit 46 had been dismissed, there is no pending action by the first defendant in respect of the lands.

[62] Thus, to address the third test enunciated in *Luggage Distributors* (*supra*), I find that that the balance of justice would be better served for the caveats to be removed as there is no reason to maintain the *status quo* until the trial of this matter because there is no pending action by the defendants.

[63] Additionally, the grant of probate remains valid and has not been revoked. Thus, so long as the grant of probate exists, the same must be obeyed following the Federal Court decision in *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151.

[64] The second defendant was represented by Messrs Tan Bak Lee & Co in the application for the vesting order who at all material times were aware that the deceased died testate and that the plaintiff is the executor of the estate of the deceased. It is trite law that the knowledge of a solicitor is imputed upon his client, following the case of *Doshi v. Yeoh Tiong Lay* [1974] 1 LNS 30; [1975] 1 MLJ 85.

[65] In light of the above, I am unable to agree with the submission of learned counsel for the first defendant that, there are other issues in the present case to be determined, ie, whether the plaintiff has the necessary *locus standi* to bring this action against the defendants.

[66] In any event, the first defendant is not a beneficiary to the estate of the deceased whether on testacy or intestacy and will not benefit even if the will is declared null and void. Following which, the first defendant has no *locus* to challenge the validity of the will and cannot adduce evidence or call expert witnesses to challenge the validity of the will – see *Lee Ngan Fong & Ors v. Gan Bo Tan & Ors* [2011] 1 LNS 770; [2011] MLJU 1493.

[67] It also pertinent to note, that was there no counterclaim by the first defendant to revoke the will or grant of probate. Hence, it would be an exercise in futility for the first defendant to challenge the validity of the will by calling an expert witness.

Conclusion

[68] An admission must be clear and precise on a particular fact for an order to be made pursuant to O. 27 r. 3 of the ROC 2012 – see *Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd & Ors* [1988] 1 LNS 88; [1988] 3 MLJ 271.

[69] For the reasons expounded hereinbefore, I hold that the judicial admissions of the first defendant in the first trial are clear and precise. Consequently, this is a suitable and appropriate case to enter judgment on admission of facts pursuant to O. 27 r. 3 of the ROC 2012.

[70] Therefore, order in terms for prayers 1 and 2 of encl. 194 is granted, with damages to be assessed and with costs of RM10,000, subject to the payment of allocator fee.